

78-1249

Supreme Court, U. S.

FILED

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MICHAEL RUDAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

THOMAS CHESTER BORING, JR.,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Mississippi

W. S. MOORE
514 Barnett Building
Jackson, Mississippi 39201
Attorney for Petitioner

Of Counsel:
MOORE and SELPH



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INTRODUCTORY STATEMENT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered on December 20, 1978, affirming petitioner's conviction for manufacture of marijuana in the Circuit Court of Leflore County, Mississippi. Copies of the judgment and sentencing order are appended as Appendix A.

OPINION BELOW

Petitioner's conviction was affirmed by the Mississippi Supreme Court on December 20, 1978. A copy of the opinion issued is appended as Appendix B. Petition for rehearing was denied on January 10, 1979 without opinion. A copy of the official report of the action of the Supreme Court of Mississippi is appended and marked Appendix C.

JURISDICTION

The judgment of the Supreme Court of Mississippi affirming petitioner's conviction was entered on December 20, 1978. Rehearing was denied on January 10, 1979. Jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Were petitioner's Due Process and Sixth Amendment rights violated by the refusal of the court to order disclosure of the identity of the confidential informant where the consistent testimony of the chief deputy sheriff was that the informant had been sent by another deputy to procure by trespass two sample seedlings from the residence prior to the issuance of the search warrant?

2. Were petitioner's Fourth and Fourteenth Amendment rights violated by the introduction of evidence seized pursuant to a search warrant issued without probable cause as indicated by major discrepancies between the testimony of affiants and the face of the affidavit?

3. Were petitioner's Fourth and Fourteenth Amendment rights violated by the introduction of evidence seized as a result of a search illegal in its inception, based upon the uncontradicted testimony that two deputies entered upon the premises of petitioner, located and secured the evidence prior to the arrival of the sheriff, who effected service of the search warrant upon the petitioner?

4. Was petitioner denied due process where the criminal statute under which he was convicted was construed to include in the offense of manufacture the growing of marijuana plants when the plain language of the statute included manufacture

only by extraction, chemical synthesis or a combination of the two?

5. Was it a violation of petitioner's Sixth and Fourteenth Amendment rights to refuse a continuance in order that petitioner could procure the testimony of his own expert chemist where petitioner had only one week's notice of his trial date?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MISSISSIPPI STATUTES INVOLVED

§ 41-29-139. Prohibited acts A; penalties.

(a) Except as authorized by this article, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

Any person who violates this subsection with respect to:

(2) Any other controlled substance classified in Schedules I, II or III, as set out in sections 41-29-113 to 41-29-117, is guilty of a felony and upon conviction may be imprisoned for not more than ten (10) years, or fined not more than fifteen thousand dollars (\$15,000.00), or both;

§ 41-29-105. Definitions.

(q) "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term "manufacture" does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging or labeling of a controlled substance:

(1) By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or

(2) By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching or chemical analysis and not for sale.

(z) "Production" includes the manufacture, planting, cultivation, growing or harvesting of a controlled substance.

§ 99-15-29. Continuance—application.

On all applications for a continuance the party shall set forth in his affidavit the facts which he expects to prove by his absent witness or documents that the court may judge of the materiality of such facts, the name and residence of the absent witness, that he has used due diligence to procure the absent documents, or presence of the absent witness, as the case may be, stating in what such diligence consists, and that the continuance is not sought for delay only, but that justice may be done. The court may grant or deny a continuance, in its discretion, and may of its own motion cross-examine the party making the affidavit. The attorneys for the other side may also cross-examine and may introduce evidence by affidavit or otherwise for the purpose of showing to the court that a continuance should be denied. No application for a continuance shall be considered in the absence of the party making the affidavit, unless his absence be accounted for to the satisfaction of the court. A denial of the continuance shall not be ground for reversal unless the supreme court shall be satisfied that injustice resulted therefrom.

STATEMENT OF THE CASE

At 11:00 p.m. on June 16, 1977, John Wayne Fondren, Deputy Sheriff of Leflore County, Mississippi, received a telephone call at the sheriff's office from an unidentified man who

stated he "had some information" to pass along. (R.29) Fondren made arrangements to meet the caller at a local convenience store. Although he had not recognized the voice of the caller, Fondren did recognize his face when he saw him at the convenience store. (R.30) The informant, who had never given information to Fondren prior to this date (R.46), gave the deputy two unidentified seedling plants which he stated he had taken that evening from a tray of "30 to 40" similar plants on the back porch of the residence of the petitioner. (R.31)

Deputy Fondren spoke with the Sheriff, Rufus Freeman, and told him of the contact made with the informant. (R.32) The Sheriff recognized the name of the informant as one who had "given . . . information before that proved to be reliable, it was the truth." (R.83) Freeman then called in Chief Deputy Ricky Banks to perform a field test upon the plants. The field test indicated the plants were marijuana. The three officers prepared, with the assistance of the county prosecuting attorney (R.84), an affidavit and "underlying facts and circumstances" sheet (see Appendix D), which was presented to a justice court judge. At 3:00 a.m., June 17, 1977, a search warrant was obtained. (R.85, 148)

Fondren and Banks, in one car, preceded Freeman (who held the search warrant) and another deputy, Carver, in a second car, to the Boring residence. Fondren and Banks approached the house from the rear while Freeman and Carver waited in their vehicle (R.64) 100 yards from the house. (R.150). Fondren and Banks located and "secured" the seedlings, then radioed the other officers to approach the house. (R.151) Freeman and Carver knocked at the front door and, receiving no response, forced an entry. (R. 65, 85) Fondren and Banks entered the screened back porch by breaking a hook latch. Freeman admitted Banks into the house proper while Fondren remained with the seedlings. (R.65) Freeman then served the warrant on Boring, who was arising from bed. (R.81) Twenty-three seedlings were seized. (R.154)

Petitioner was indicted on November 10, 1977 for manufacture of a controlled substance (R.2), arraigned on November 15, 1977 (R.4), and tried on November 28 and 29, 1977 (R. 124).

Prior to the trial, the following motions were filed by petitioner:

(1) Motion to Reveal Information, seeking disclosure of the identity of the informant. (R.10)

(2) Motion to Quash the Indictment (R.9), asserting that the indictment did not charge a crime against the State of Mississippi. Motion denied. (R.27)

(3) Demurrer to the indictment (R.13), again asserting the indictment did not charge a crime against the State of Mississippi. Demurrer denied. (R.27)

(4) Motion to Suppress Evidence (R.18) was filed on November 21, 1977, charging lack of probable cause for the issuance of the search warrant, that the informant was not shown to be credible or reliable and that the informant acted as agent for the state when he seized the evidence which served as the basis of the search warrant. A hearing was held on the motion on November 21, 1977 (R.26-92), in which the petitioner sought to have the identity of the confidential informant revealed and the evidence suppressed. Motion denied at R.89.

(5) Renewal of Motion to Require the State to Furnish the Name and Whereabouts of the Confidential Informant, filed November 28, 1977. (R.94) Motion denied. (R.123)

(6) Sworn Application for Continuance (R.97) seeking a continuance until the following term of court (a postponement of three or four months) in order to allow petitioner to obtain the presence of an out-of-state expert witness on marijuana identification. Motion denied. (R.123)

A jury trial was held on November 28 and 29, 1977. All previous motions were renewed by petitioner at the conclusion of the state's case (R.270), and a motion to exclude the evidence and direct a verdict for petitioner was offered as well. These motions were denied. (R.272)

At the conclusion of all testimony, a proffer of proof was made as to the testimony which would have been given by petitioner's expert had a continuance been granted. (R.296) Petitioner also offered instructions on the definition of "manufacture" (R.311, 312, 313, 314) which were refused. The jury returned a verdict of guilty as charged. (R.319)

All points raised on this petition were raised on Motion for Judgment Notwithstanding the Verdict (R.325) and on Motion for New Trial. (R.322) On appeal to the Mississippi Supreme Court, these questions were raised as Propositions I, II, III, IV, VI, VII of Appellant's Brief, and on Petition for rehearing as Propositions I, II, III, IV, V of Appellant's Brief.

REASONS FOR GRANTING THIS WRIT

I

The Refusal of the Trial Court to Require Disclosure of the Informant's Identity in the Face of Conflicting Testimony of Affiants as to the Informant's Role in the Uncovering of Evidence and the Affirmance of Petitioner's Conviction by the Mississippi Supreme Court Has Decided a Substantial Federal Question in a Manner Inconsistent With Prior Decisions of This Court.

Argument

The evidence in the record shows that the only two persons who were present at petitioner's residence during the evening of June 16, 1977, were petitioner and Jas B. Martin. The testimony showed that petitioner and Martin left the residence between 5:30 and 8:00 p.m. (R.282), and petitioner did not return until after midnight. (R.290) The informant, however, at 11:00 p.m., gave to Fondren two seedlings which he said came from the back porch of petitioner that evening. (R.46) According to this testimony, the evidence in the hands of the informant would have been procured by trespassing upon the property of the petitioner during the evening hours while the house was vacant.

Chief Deputy Ricky Banks testified at the preliminary hearing and at the trial that he was told on the date of the incident by Fondren himself or by the county attorney that the informant had simply supplied Fondren with a tip that seedlings were present at the residence of petitioner. Fondren then sent the informant to obtain samples for the sheriff's office. (R.166-168) Banks also testified concerning the existence of a tear in the screen on the back porch near the plants "big enough for your hand to go through." (R.168) Two other witnesses testified that

this tear was not present the day before the raid on the Boring residence by the sheriff and his deputies. (R.275, 294) This testimony indicates that the informant, acting as agent for the police authorities, obtained evidence against petitioner by trespass and breaking and entering. Although these facts were in dispute, if this is in fact what happened, the search warrant was based upon half-truths and misrepresentations and disguised the illegal activities of one acting for the authorities.

Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L. Ed.2d 639 (1957), limits the government's privilege to withhold from disclosure the identity of informants by the general rule that disclosure must be made where the "informer's identity, or of the contents of its communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. . . ." 77 S.Ct. at 628.

McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), distinguished the *Roviaro* decision, holding that where the issue is one of probable cause for a search rather than guilt or innocence, police officers are not invariably required to disclose the identity of the informant if the trial judge is convinced that the officers relied in good faith upon credible information. It should be noted that the trial judge's determination on this point is not unassailable. *Frank v. Delaware*, — U.S. —, 98 S.Ct. 2674 (1978). In this circuit disclosure has been held to be constitutionally required where probable cause is the sole issue. *United States v. Freund*, 525 F.2d 873 (5th Cir. 1976).

Petitioner asserts that testimony indicates that police officers here did not rely in good faith upon credible information. It is clear that a search warrant procured by officers based upon information they obtained by the commission of a trespass invalidates that warrant. Petitioner believes that if such a trespass and breaking and entering was committed by an informant at the direction of the officers, the search warrant is likewise in-

valid. A search and seizure which is illegal at its inception cannot be rendered legal by what it brings to light. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The testimony of the informant would have been not only relevant and helpful, but absolutely necessary to reach the truth and to establish probable cause for the issuance of the search warrant and the legality of the subsequent search. The refusal of the court to require disclosure denied petitioner his rights of confrontation and cross-examination.

II

In Rejecting Petitioner's Fourth Amendment Claim That the Search Warrant Was Issued Without Probable Cause, the Supreme Court Has Decided a Federal Question of Substance in a Manner Which Is Inconsistent With Prior Decisions of This Court.

Argument

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) requires, when a confidential informant supplies the information which serves as the basis for the issuance of a warrant, that "the magistrate must be informed of . . . some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable'." 84 S.Ct. at 1514. Probable cause must be apparent from the face of the affidavit in order for a search warrant to stand. *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). The court, in determining whether probable cause existed for the issuance of the warrant, must consider any testimony which discredits or impeaches the assertions contained in the affidavit. *United States v. Roth*, 391 F. 2d 501 (7th Cir. 1968).

According to the testimony of Sheriff Freeman, the "Underlying Facts and Circumstances" sheet was prepared by the affiants and the county attorney prior to the arrival of the magistrate. When the magistrate arrived at the sheriff's office, the underlying facts and circumstances sheet (see Appendix D) was simply read to him. (R.36) No hearing or informal conversations were held whereby an amplification of the factual situation was aired. The search warrant was immediately issued.

Although the affidavit makes several bare assertions concerning the credibility and reliability of the informant, such bare statements cannot be deemed to meet the *Aguilar* requirement that the issuing magistrate must be informed of factual circumstances from which the affiant officer drew this conclusion. There was no allegation or showing that the information given Freeman prior to this date by the informant concerned criminal activity which resulted in successful prosecutions, or that previous information had been corroborated and verified by independent investigation.

Even if such bare statements were sufficient, the court cannot ignore major discrepancies which were uncovered between the testimony of the affiants and the face of the affidavit. First, the affidavit states that the informant brought two plants to Deputy Fondren, but the testimony of Deputy Banks was that the informant was sent by Fondren to seize that evidence. Deputy Fondren denied this, but Banks steadfastly maintained this understanding, despite the fact that he averred otherwise in the affidavit. This point is detailed in Proposition I of this petition. Second, the affidavit states that the informant believed the seedling plants to be marijuana, and that the informant had seen marijuana in the past. Testimony from the only deputy who had contact with the informant, Deputy Fondren, does not support this statement. It was the testimony of Fondren that "He handed me two small plants. . . . He told me he had been to Dr. Boring's house and that he had 30 to 40 of these plants in his

house." (R30-31) There is not one word of testimony to support the claim of the affidavit that the informant stated that the plants were marijuana, or that the informant had had any experience in or knowledge of identification of marijuana seedlings, or that he had even seen marijuana seedlings before this date.

The conflict between the testimony of the affiants and the matters on the face of the affidavit are not minor points but reach major assertions bearing heavily upon a determination of probable cause. When the testimony of the affiants is compared with the statements of the affidavit, contradictions are noted so glaring as "to require the trial court to find the affidavit insufficient as a matter of law." *United States v. Roth*, 391 F.2d 507, 509 (7th Cir. 1968). Petitioner would assert that such a substantial showing that material misrepresentations were included in the affidavit would entitle him, under *Franks v. Delaware*, *supra*, to a reversal of his conviction.

The failure to meet the *Aguilar* standard of the reliability and credibility of the informant and the material misrepresentations which abound in the affidavit combine to render the resulting search warrant void, and any evidence seized in the search undertaken pursuant to that warrant inadmissible at trial. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

III

In Allowing Evidence Illegally Seized to Be Introduced at Trial, the Supreme Court Has Decided a Federal Question of Substance in a Manner Which Is Inconsistent With Prior Decisions of This Court.

Argument

All of the testimony at the hearing on the motion to suppress and at the trial was that the four police officers traveled to the petitioner's residence in two vehicles. Banks and Fondren rode

in the first automobile; Carver and Freeman (who carried the search warrant) rode in the second automobile. Banks and Fondren parked their car and approached the house on foot from the rear while Carver and Freeman waited in their automobile approximately 100 yards down the street from the residence. Banks and Fondren carried walkie-talkies and flashlights. It was their plan that they would approach the residence on foot, station themselves at the back porch, "secure" the evidence, then radio the sheriff and Carver to approach the house. The back porch was described as a screened-in area with only a screened door closed by a hook latch. Deputy Banks stated that he and Fondren located the plants, stood within one foot of the seedlings outside the screened-in area, and shined their flashlights on the plants in order to keep the petitioner from making an attempt to destroy the evidence. Once they ascertained the plants were "secure", he radioed the Sheriff and Carver to approach the house.

Sheriff Freeman testified that after being informed that the evidence had been "secured", he and Carver approached by automobile and parked in front of the Boring residence. A light was on inside the house, but no one answered the knock, so they forced the door open and entered. When Fondren and Banks heard the officers enter the front door, they entered the screened door onto the back porch. One of the officers then opened the back wooden door into the house to allow Banks to enter the living area. Fondren remained on the back porch to maintain security of the plants. Only after Banks entered the residence was petitioner served with the search warrant.

The search was commenced and substantially completed, the evidence located and secured by means of a trespass upon petitioner's property before the holder of the warrant even reached the premises and long prior to the service of the warrant upon the petitioner, in clear violation of petitioner's Fourth Amendment rights. Such evidence, seized in a search illegal in its inception, is inadmissible. *Mapp v. Ohio*, supra.

IV

In Construing §41-29-105(z), Mississippi Code of 1972 (Supp. 1977) to Amend and Amplify Subsection (q), the Supreme Court Subjected Petitioner to Criminal Liability for Past Conduct, Deciding a Substantial Federal Question in a Manner Inconsistent With Prior Decisions of This Court.

Argument

Petitioner was convicted of the violation of §41-29-139(a), Mississippi Code of 1972 (Supp. 1977), manufacture of a controlled substance, to-wit: marijuana. The term "manufacture" is defined by §41-29-105(q) (Supp. 1977).

The plain language of that statute is that a conviction of the offense of manufacture requires proof by the state that the manufacture was effected, either directly or indirectly, in one of three ways: by extraction from substances of natural origin, by chemical synthesis, or by a combination of extraction and chemical synthesis. The state failed to prove that the manufacture was accomplished in one of these three ways proscribed by statute, and the trial court refused to instruct the jury as to those elements of the offense.

The Mississippi Supreme Court, in considering the language of the statute on appeal in this cause, admitted that the plain language of the statute

confuses the reader and does make it appear that the manufacture must be either by extraction, chemical synthesis or a combination thereof.

(See Appendix C)

The court chose to read and construe (q) and (z) together, thereby making the statute prohibit the growing of marijuana plants. Petitioner would assert that by the reading of the two

subsections together, the state would still be required to prove that manufacture was effected by extraction, by chemical synthesis or by a combination of the two methods.

"Manufacture" means the production ("production" means the manufacture, planting, cultivation, growing or harvesting of a controlled substance), preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

Rather, the Mississippi Supreme Court has made subsection (z) amend subsection (q) and enforced against this petitioner a statute as the court thinks the legislature should have written it. In so doing, the State of Mississippi has punished this petitioner for conduct not criminal at the time of commission, in violation of the Due Process Clause of the Fourteenth Amendment requiring that a criminal statute give fair warning of the conduct which it prohibits.

Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) considered this exact situation in regard to a trespass statute. This Court said in *Bouie* that the enlargement of a statute narrow and precise in its language is more dangerous than one vague and overbroad, in that "it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." The court emphasized that "When . . . state court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." 50 S.Ct. at 454.

Petitioner submits that if the Mississippi Supreme Court chooses to amend the statute by judicial interpretation, the Fourteenth Amendment requires that fair warning be given and such amendment can have only prospective operation, inapplicable to this petitioner.

"Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses." *United States v. Resnick*, 299 U.S. 208, 57 S.Ct. 126, 81 L. Ed. 127 (1936).

V

The Denial of a Continuance Sought to Secure the Presence of an Expert Witness in Order to Meet and Overcome the Testimony of the State's Expert Witness Is Inconsistent With Prior Decisions of This Court.

Argument

Petitioner was indicted on November 10, 1977, arraigned on November 15, and a preliminary hearing was held on November 18. On November 21 a hearing was held on petitioner's Motion to Suppress Evidence. At the November 21 hearing, trial was definitely set for November 28. On November 23 (Wednesday of Thanksgiving week) the trial judge and district attorney were informed that petitioner would seek a continuance in order to obtain expert testimony. Because the courthouse was closed from 2:00 p.m. on November 23 until Monday, November 28 (trial date) for the Thanksgiving holiday, petitioner's Sworn Application for Continuance was not filed and heard until November 28. The continuance was denied.

In all manners petitioner complied with Mississippi law in the submission of his Sworn Application for Continuance. Although under Mississippi law the granting of a continuance is

within the discretion of the trial judge (§99-15-29, Mississippi Code of 1972), Petitioner asserts that in this instance the denial was clearly an abuse of discretion and operated to deny petitioner his right to a fair and impartial trial.

As petitioner set out in his application and by his proffer of proof, the witness, a chemist, was an expert in the testing and identification of marijuana. His testimony would have tended to discredit the testing techniques and analyses used by the state's experts in making his identification of the evidence seized from petitioner's residence. The expert witness would have testified further that marijuana does not grow, nor is it planted, cultivated or harvested, either directly or indirectly, by any of the three methods defined and proscribed by Mississippi law. (R. 396)

The identification of the evidence as marijuana was crucial to the state's case against petitioner, and, likewise, the discrediting of the identification was crucial to petitioner's defense. The state's expert, Mr. James Williams, admitted that the proximity of marijuana plants to non-marijuana plants, a contamination in the amount of one-millionth of a gram of tetrahydrocannabinol from his lab coat, his lab instruments, or even his hands, could have falsely produced positive results under the testing procedures he used. Nevertheless, Mr. Williams could not recall cleaning his work area or equipment, washing his hands or changing his lab coat prior to examining the seedlings. (R. 231-233, 247-251) Mr. Williams also testified that several other substances could have produced positive results in the testing methods he used.

Petitioner was given only one week's notice as to the trial date. Where the guilt or innocence of a defendant is determined entirely by the identification of the seedlings as marijuana, due process requires that the defendant should have a reasonable time in which to secure an expert to analyze the material and refute the techniques of the state's expert witness.

Petitioner asserts that §99-15-29 was applied in this case so as to deny him a fair opportunity to meet and overcome the state's testimony in violation of his Fourteenth Amendment rights. *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943).

Respectfully submitted,

WILLIAM SEBASTIAN MOORE
514 Barnett Building
Jackson, Mississippi 39201

MOORE and SELPH
Of Counsel

APPENDIX

— A-1 —

APPENDIX A

Judgment and Sentencing Order of the Circuit Court of Leflore County, Mississippi

THE STATE OF MISSISSIPPI

VS. NO. 19,078

THOMAS C. BORING, JR.

This day came the District Attorney on the part of the State, and the Defendant, Thomas C. Boring, Jr., in his own person and by his attorneys, who having been arraigned on a former day of this court on indictment charging him with Manufacture of Marijuana, and entered his plea of Not Guilty thereto.

WHEREUPON, came a jury of good and lawful men and women of said County, composed of Betty E. Daves and eleven others, who, after having been duly selected, empaneled and sworn to try the issue, joined and after having heard all the evidence and the argument of counsel and received the instructions of the Court, retired in charge of their sworn Bailiffs to consider their verdict and presently returned into open Court in the presence of the defendant and his attorney, the following verdict:

"We, the Jury, find the defendant guilty as charged."

The Court thereupon on the request of Counsel for the Defendant polled the Jury asking each Juror, "Is that your verdict?" and each Juror so polled answered "Yes".

IT IS, THEREFORE ORDERED by the Court that the Defendant be released on his same bond to await the sentence of the Court. (R. 320, 321)

THE STATE OF MISSISSIPPI

VS. NO. 19,078

THOMAS C. BORING, JR.

The defendant, Thomas C. Boring, Jr., having been convicted on a charge of Manufacture of Marijuana on a former day of this Court, accompanied by his Attorney, was brought to the Bar of the Court and asked if he had anything to say why the sentence of the Court should not be pronounced against him, and he answering naught.

IT IS, THEREFORE, CONSIDERED by the Court and SO ORDERED, that for the crime of Manufacture of Marijuana of which he, the said Thomas C. Boring, Jr., stands convicted that he be taken hence to the Jail of Leflore County, Mississippi, there to remain until called for by the State Warden and by him conveyed to the State Department of Corrections at Parchman, Mississippi, there to remain for a term of FIVE YEARS; subject, however, to credit for time served in jail, and to pay a fine of \$1,000.00 Dollars.

IT IS FURTHER ORDERED by the Court that TWO YEARS of said sentence be, and the same is hereby, suspended under supervision of the State Department of Corrections; said supervision to include any time not served in confinement. (R. 334)

APPENDIX B

Opinion Issued by the Mississippi Supreme Court on

December 20, 1978

IN THE SUPREME COURT OF MISSISSIPPI

NO. 50,813

THOMAS C. BORING, JR.

v.

STATE OF MISSISSIPPI

BEFORE ROBERTSON, P.J., WALKER AND BROOM, JJ.,
AND GRIFFIN, COMMISSIONER

J. RUBLE GRIFFIN, COMMISSIONER FOR THE COURT:¹

The appellant was convicted in the Circuit Court of LeFlore County for manufacture of marijuana under an indictment, the stating part of which reads as follows: "wilfully and feloniously manufacture a controlled substance by propagating or growing 23 plants of cannabis, commonly called marijuana."

The court gave, at the State's request the following instruction:

The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that Thomas C. Boring, Jr., did on or about the 17th day of June, 1977 in LeFlore County, Mississippi, unlawfully, willfully and feloniously

¹ Sitting pursuant to Chapter 430, Laws of 1976. The above opinion is adopted as the opinion of the Court.

manufacture a controlled substance by growing same or by growing 23 plants of cannabis, which is commonly called marijuana, then it is your sworn duty to find the defendant, Thomas C. Boring, Jr., guilty as charged.

The appellant requested instructions that would have required proof that the manufacture was effected, either directly or indirectly, in one of three ways: by extraction, by chemical synthesis, or by a combination of these two methods, contending that by virtue of Mississippi Code Annotated, Section 41-29-105(q) (Supp. 1977), one of the above must be proved as an element of the offense charged. The code section reads as follows:

(q) "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term "manufacture" does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging or labeling of a controlled substance: * * *

It is contended by the appellant that the comma following the word "indirectly" should have been omitted and the word "or" inserted. Admittedly the parenthetically setting out of "either directly or indirectly" confuses the reader and does make it appear that the manufacture must be either by extraction, chemical synthesis or a combination thereof. However, Section 41-29-105 supra, is the definitive section of that chapter of the Mississippi code on controlled substances, and sub-section (z) defining production reads as follows: "'Production' includes the manufacture, planting, cultivation, growing or harvesting of a controlled substance." In order to give proper meaning as

obviously intended by the Legislature, sub-sections (q) and (z) must be read and construed together. *Aikerson v. State*, 274 So.2d 124 (Miss. 1973). Manufacturing embraces production and production embraces manufacturing and planting, cultivation, growing or harvesting. Construing the two sub-sections together, it becomes apparent that the Legislature prohibited the growing of marijuana; therefore, the State's instruction was proper and the requested instructions by the appellant were properly refused inasmuch as the State had made no effort to show that the defendant manufactured marijuana by extraction, chemical synthesis or a combination thereof. The State was not required to do this. The simple growing of the plant is prohibited.

The Court has examined Chapter 415, Mississippi General Laws of 1974, from which Section 41-29-105 is taken, and the original thereof does not have a comma after the word "indirectly" as placed by the codifier. This Court should examine the history of a statute in order to find its meaning. *Aikerson v. State*, supra.

The appellant contends that his instructions are patterned after Instruction 104.20 (1977), Mississippi Model Jury Instructions, which reads as follows:

104.20 Manufacture

Pattern Instruction

Manufacture means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term "manufacture" does not include

the preparation or compounding of controlled substance by an individual for his own use or the preparation, compounding, packaging or labeling of a controlled substance:

- (1) By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or
- (2) By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching or chemical analysis and not for sale.

We address ourselves to this question solely for the benefit of the bench and bar and point out that the above instruction would have no place in a trial wherein the indictment charges one with growing marijuana. The above instruction is simply an abstraction tracking the statute and should not be given where not supported by the evidence.

Both the appellant and the State filed lengthy, scholarly briefs and six other errors were assigned. The Court has carefully reviewed the record, thoroughly read both briefs and appellant's reply, and can find no merit in the other errors assigned.

AFFIRMED.

**PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J.,
SUGG, WALKER, BROOM, LEE, BOWLING, AND
COFER, JJ., CONCUR.**

APPENDIX C

**A Copy of the Official Report of the Action of the Mississippi
Supreme Court in Its Denial of Petition for Rehearing on**

January 10, 1979

IN THE SUPREME COURT OF MISSISSIPPI

**WEDNESDAY, JANUARY 10, 1979, COURT SITTING:
THOMAS CHESTER BORING, JR.**

#50,813 v.

STATE OF MISSISSIPPI

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said petition be and the same is hereby denied.

APPENDIX D

Copy of the Affidavit for Search Warrant and "Underlying Facts and Circumstances Sheet"

AFFIDAVIT FOR SEARCH WARRANT

State of Mississippi
County of Leflore

This day personally appeared before me, the undersigned judicial officer of said county,, Rufus Freeman, Wayne Fondren and Ricky Banks, known to me to be credible persons, who, after having been first duly sworn, depose and say:

1. That affiants have good reason to believe and do believe that certain things hereafter described are now being concealed in or about the following place in this County: (here particularly describe the place to be searched.) At his residence located at 103 Virginia St. Greenwood, Leflore County, Miss., together with all approaches and appurtenances thereto.

2. That the place described above is occupied and controlled by: Dr. T. C. Boring.

3. That said things are particularly described as follows: (here describe the thing or things to be seized, taking care to describe only those things which affiants have probable cause to believe and do believe are concealed at the place described above, and with enough particularity to insure that an uninformed officer will not seize one thing under a warrant describing another. Mere evidence is not a proper subject of a search or seizure. Certain things subject to search and seizure include, in addition to the specific subjects enumerated in the Code, all

contraband; instrumentalities used in the commission of a crime; and books, writings, pictures and prints adjudged in a proper proceeding by a proper court to be obscene.)

A Schedule I Substance, Cannabis Sativa and all species of the Genus, Cannabis, commonly called Marijuana, and all Paraphernalia used for the Manufacture, usage, and packaging of a Controlled Substance.

4. That possession of the above described things is in itself unlawful (or the public has a primary interest in, or primary right to possession of, the above described things), in that said things are: (here state briefly the use and intention for use of the specified things, citing the appropriate Code section or ordinance being violated and charging its violation, and a brief narrative account of the offense being committed.)

Section 41-29-139 of the Uniform Controlled Substance Act of 1971, as Amended, Mississippi Code of 1972.

5. The facts tending to establish the foregoing grounds for issuance of a Search Warrant are shown on a sheet headed "Underlying Facts and Circumstances" which is attached hereto, made a part hereof and adopted herein by reference. (The attached sheet must contain enough of the underlying facts and circumstances to enable the issuing officer to fairly ascertain that probable cause exists for the issuance of the warrant. All persons having knowledge of the facts should sign the affidavit and attached sheet, be identified throughout by name, and appear before the issuing officer for examination.

Information obtained from informants must be described as reliable and the informants identified as credible persons. It is not absolutely essential that the identity of the informants be disclosed, but there must be shown enough of the underlying facts and circumstances from which the affiants conclude that the informants are credible and their information reliable.

Avoid vague recitals such as "suspect was observed" and "The Sheriff's office received information." Use factual recitals showing names, places, times and dates, in commonsense, non-technical language. Be specific and give the information in detail.)

6. WHEREFORE, affiants request that a search warrant issue directing a search of the above described place and seizure of the above described things.

Ricky Banks
Affiant

Wayne Fondren
Affiant

Rufus Freeman
Affiant

.....
Affiant

Sworn to and subscribed before me, the 17th day of June, 1977.

/s/ Jimmy Wailes
Justice Court Dist. 1
Leflore Co. Miss.

Sheriff's Department
Leflore County, Mississippi
Post Office Box 905 Telephone 453-5141
Greenwood, Mississippi 38930

Rufus Freeman
Sheriff

"EXHIBIT A"

"Underlying Facts and Circumstances"

The underlying facts and circumstances were presented to the undersigned by a reliable and confidential informer known to Wayne Fondren and other members of the Leflore County Sheriff's Office and one who has presented information to this office in the past which has proven to be accurate and correct, to wit;

On June 16, 1977, a reliable informer, referred to above, informed the undersigned Wayne Fondren, that Dr. T. C. Boring had between thirty and fifty marijuana plants growing on his back porch located at 103 Virginia Street, Greenwood, Leflore County, Mississippi. That the described plants were seen by this person on this night, that two plants were seized by this person on this night and that this person believed same to be marijuana and that this person has seen marijuana in the past. That this person brought to the undersigned Wayne Fondren the above described plants on this night and stated that they came from the Boring address. These plants were identified as marijuana by the undersigned Chief Deputy Ricky Banks who has seen same in the past. That when this person left the Boring residence, plants were still present and growing.

This informer is known to be credible and has furnished reliable information in the past to Sheriff Rufus Freeman.

/s/ Wayne Fondren
/s/ Ricky Banks
/s/ Rufus Freeman